

A **MOHAMMAD JOBI ULLAH v. PP**
COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AHMAD NASFY YASIN JCA
NORDIN HASSAN JCA
B [CRIMINAL APPEAL NO: P-05(M)-255-08-2020]
16 JUNE 2022

C **Abstract** – *To succeed in relying on the incompetency of counsel resulting in breach of constitutional right to fair trial, it must be shown that there has been flagrant or gross incompetency that deprived the accused of a fair trial. This only applies in an extreme situation that causes a miscarriage of justice. What is an ‘extreme situation’ must depend on the facts of each case.*

D **CRIMINAL PROCEDURE:** *Appeal – Appeal against conviction and sentence – Accused charged with murder – Accused struck deceased’s head – Deceased died due to head injury caused by blunt force trauma – Defence of grave and sudden provocation – Accused sentenced to death by hanging – Whether conviction and sentence safe – Whether there was flagrant incompetency of previous counsel who represented accused during trial – Whether flagrant incompetency of previous counsel resulted in breach of accused’s constitutional rights to fair trial – Penal Code, s. 302*

F The appellant, a Bangladesh national, was charged with the murder of one Minto (‘deceased’), also a Bangladesh national, which was punishable under s. 302 of the Penal Code (‘PC’). The prosecution’s case hinged mainly on the evidence of two eyewitnesses, PW1 and PW2, who saw the incident that happened in their living quarters (‘premises’). Based on the evidence narrated by PW1 and PW2, there was a quarrel between the appellant and the deceased in the kitchen area. PW1 saw the appellant holding the deceased’s face and struck the deceased’s head with a curry pot, resulting in the deceased falling to the floor. To break up the quarrel, PW1 pushed the appellant away from the deceased and together with another occupant of the premise, held the appellant, pushed the deceased to PW1’s room and asked the appellant to sit on PW1’s sofa. Thereafter, about a minute after the appellant sat, he got up and picked a rice cooker, walked towards the deceased and struck the deceased with a rice cooker. The deceased shrieked and fell onto the floor. The deceased was brought to the hospital and the physician who attended to him found him unconscious and there was a wound on the right side of the forehead. The deceased succumbed to his injuries and was pronounced dead.

G According to the pathologist (‘PW4’) who conducted the post-mortem, the cause of death was a head injury due to blunt force trauma. The prosecution relied on s. 300(c) of the PC to establish the offence of murder against the appellant. At the end of the prosecution’s case, the trial judge found that the

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prosecution had established all the ingredients of the offence and had succeeded in proving a *prima facie* case against the appellant. The appellant was ordered to enter his defence. The appellant admitted that there was a quarrel and a minute after being pushed by PW1, he had struck the deceased with the rice cooker because he was angered by the deceased's verbal vulgarities about the appellant's parents. The appellant's father had passed away whilst his mother was in the hospital. Essentially, the appellant's defence was grave and sudden provocation. The trial judge found that (i) the appellant had failed to establish the defence of grave and sudden provocation on the balance of probabilities through the said utterance of vulgarities by the deceased; (ii) the prosecution had proven its case beyond a reasonable doubt; and (iii) the appellant was guilty as charged and convicted for the offence under s. 302 of the PC. The appellant was sentenced to death by hanging. Hence, the present appeal. The appellant submitted only one main issue in this appeal, which was the flagrant incompetency of the previous counsel who represented the appellant during the trial resulting in a breach of the appellant's constitutional rights to a fair trial. The reasons for this contention were due to the counsel's failure to (i) recall PW1 to establish the appellant's defence that the deceased uttered vulgar words towards the appellant's parents; (ii) engage a Bangladeshi interpreter when counsel interviewed the appellant in prison. This resulted in the counsel being unable to properly understand the appellant due to the language problem; (iii) the failure to recall PW12 to ask him the reason as to why the fact that the vulgar words uttered by the deceased were not stated in D25 although he was informed by the appellant; and (iv) ask the appellant during the trial, the specific vulgar words uttered by the deceased towards the appellant's parents.

Held (dismissing appeal):

Per Nordin Hassan JCA delivering the judgment of the court:

- (1) The trial judge had made a finding of facts that the appellant intentionally caused injury to the deceased's head which in the ordinary course of nature would cause death. As such, cl. (c) of s. 300 of the PC was applicable. The basis of this finding was that PW1 and PW2 saw the appellant's act of striking the deceased's head with the rice cooker, the appellant assaulted the deceased barely a minute after the appellant sat on the sofa in PW1's room, the force of the strike was so great that it caused the deceased to shriek and fall to the floor, that the strike was directed to the deceased's head and the injuries caused by the strike resulted in the death of the deceased. There was no reason to interfere with these findings as it was supported by evidence that was correctly evaluated by the trial judge. In the circumstances, the first ingredient of cl. (c) of s. 300 that the appellant intentionally caused bodily injury to the deceased had been proven by the prosecution. (paras 28-30)

- A (2) In the contemporaneous document that was the appellant's written statement ('D25') recorded by PW12 five days after the incident, the appellant stated that the reason he struck the deceased with the rice cooker was because the deceased refused to remove his pot that blocked the appellant's kitchen cabinet. This resulted in the fight between the
- B appellant and the deceased and ended up with the deceased striking the deceased with the rice cooker. Nothing was mentioned about the utterance of vulgar words towards the appellant's parents by the deceased. During the defence stage, the appellant testified that he did inform PW12 about the vulgar words uttered by the deceased but was
- C not recorded by PW12 in D25. This assertion was untenable. The reasons given by the appellant for hitting the deceased as stated in D25 were very detailed. There was no reason for PW12 to omit or exclude the appellant's pertinent defence in D25. Further, in D25, the appellant admitted that there was nothing to add in D25 and put his thumbprint on it. As such, the trial judge was correct in not accepting the appellant's
- D contention. Another important fact to note was that in the appellant's testimony, the appellant failed to detail out what were the vulgar words uttered by the deceased. This was important as the words that were said had provoked the appellant to strike the deceased. The trial judge needed to assess those words in determining whether the defence had proven on the balance of probabilities that the appellant and any reasonable man would lose the power of self-control because of the utterance of those words. This the appellant failed to do. (paras 47, 51 & 53)
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- F (3) The possibility of the deceased uttering the vulgar words was far-fetched considering the facts, *inter alia*, that no mention was made of these vulgarities in D25 and the prosecution witnesses were not asked on this issue. In any event, even if the deceased did utter the vulgar words, the defence had not established the defence of grave and sudden provocation on the balance of probabilities. On the issue of the language barrier and counsel's failure to engage a Bangladeshi interpreter when interviewing
- G the appellant in prison, the issue was found to be devoid of any merit. The appellant had been staying in Malaysia for 11 years and it was a safe inference to be made that the appellant understood the national language. In the circumstances, there was no flagrant incompetency on the part of the appellant's counsel that deprived the appellant of a fair trial. There was no miscarriage of justice in this case. (paras 62-64)
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- I (4) The conviction against the appellant was safe and needed no intervention. The decision of the High Court on the conviction and sentence were affirmed. (para 67)

Case(s) referred to:

- Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281 FC (*refd*) A
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (*refd*)
Ikau Anak Mail v. PP [1973] 1 LNS 51 FC (*refd*)
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC (*refd*)
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC (*refd*)
Mohd Shawal Abdullah v. PP (Rayuan Jenayah K-05(M)-160-04-2016) (Unreported) (*refd*) B
Mohd Yasser Shaik Mahmad v. PP [2017] 5 CLJ 44 CA (*refd*)
Rikky Purba v PP [2014] 3 CLJ 607 CA (*refd*)
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC (*refd*)
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC (*refd*)
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC (*refd*)
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC (*refd*) C
Virsa Singh v. State of Punjab AIR [1958] 465 (*refd*)
Yahya Hussein Mohsen Abdulrah v. PP [2021] 9 CLJ 414 FC (*refd*)
Zulkiple Mohamad v. PP [2022] 1 CLJ 673 FC (*refd*)

Legislation referred to:

- Evidence Act 1950, s. 105 D
 Penal Code, ss. 300(c), 302

For the appellant - Anbanathan Yathiraju; M/s Anba & Assocs
For the respondent - Baizura Kamal; DPP

[Editor's note: For the High Court judgment, please see *PP v. Mohammad Jobi Ullah* [2020] 1 LNS 972. (*affirmed*).] E

Reported by Lina E

JUDGMENT**Nordin Hassan JCA:**

[1] Mohammad Jobi Ullah ("the appellant"), a Bangladesh national, was charged with the murder of one Minto ("the deceased") also a Bangladesh national, which is punishable under s. 302 of the Penal Code. The learned judge of the Penang High Court found the appellant guilty of the offence and sentenced him to death. Aggrieved, the appellant appealed against the said decision before this court. G

[2] The charge against the appellant reads as follows:

Bahawa kamu pada 25.03.2018, jam lebih kurang 11.15 pagi, bertempat di No. 1, Jalan Megat Harun, Taman Jasa, 14000, Bukit Mertajam, dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah membunuh seorang bernama Minto (No. Pasport: BQ 0161645) dan dengan itu kamu telah melakukan kesalahan membunuh yang boleh dihukum di bawah seksyen 302 Kanun Keseksan H

[3] Having heard the oral submissions and read the written submissions from both parties as well as the records of appeal, it is our unanimous decision that the appellant's appeal is without merit, and hence, the appeal is dismissed. Our decision is based on the following analysis and reasons. I

A The Prosecution's Case

B [4] The prosecution's case hinges mainly on the evidence of two eyewitnesses who saw the incident that happened in the living quarters where the two eyewitnesses, the deceased, the appellant, and several other occupants stay. The eyewitnesses are Akram Hossan (PW1) and Iqbal (PW2).

C [5] Based on the evidence narrated by PW1 and PW2, on 25 March 2018, at about 11.45am, at their living quarters situated at No. 1, Jalan Megat Harun, Taman Jasa, Bukit Mertajam, Pulau Pinang ("the premises"), there was a quarrel between the appellant and the deceased in the kitchen area. PW1 saw the appellant holding the deceased's face and struck the deceased's head with a curry pot resulting in the deceased falling to the floor. The deceased then was seen throwing punches toward the appellant. To break-up the quarrel, PW1 pushed the appellant away from the deceased and together with another occupant of the premise, Daloar held the appellant, pushed the deceased to PW1's room, and asked the appellant to sit on PW1's sofa.

E [6] Thereafter, about a minute after the appellant sat on the sofa, the appellant got up, picked up a rice cooker, walked towards the deceased and struck the deceased on the head with a rice cooker (P20B). The deceased shrieked and fell onto the floor. The incident was also witnessed by PW2.

F [7] The deceased was then brought to Hospital Bukit Mertajam and the physician, Dr Muhammad Alyad (SP5), who attended to the deceased, found that the deceased was unconscious and there was a wound on the right side of the forehead. Having stitched the deceased wound, SP5 referred the deceased to Hospital Seberang Jaya for a CT scan to be done as SP5 suspected the deceased sustained internal head injuries.

G [8] On 28 March 2018 at 5.44am, the deceased succumbed to his injuries and was pronounced dead. According to Dr Chandroth a/l Pankajakshan (SP4), the pathologist who conducted the post-mortem, the cause of death was determined as a head injury due to blunt force trauma.

[9] The prosecution relied on s. 300 cl. (c) of the Penal Code and the evidence of the prosecution's witnesses to establish the offence of murder against the appellant.

H Findings Of The Trial Judge At The End Of The Prosecution's Case

I [10] At the end of the prosecution's case, after having considered the evidence on the maximum evaluation, the trial judge found that the prosecution had established all the ingredients of the offence and the appellant had committed an act that comes within s. 300 cl. (c) of the Penal Code which constitutes an act of murder. As such the trial judge concluded that the prosecution had succeeded in proving a *prima facie* case against the appellant and ordered the appellant to enter his defence.

The Defence's Case

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[11] The appellant was the only witness for the defence who gave evidence under oath.

[12] The appellant's version of the incident was as follows. On the material date and time, the appellant and the deceased quarrelled concerning a pot belonging to the deceased that were said to have obstructed the appellant's kitchen cabinet. The deceased was said to have punched the appellant which then led to a fight. During the fight, the appellant hit the deceased's hand with a curry pot before their fight was stopped by PW1, PW2 and one Iqbal. PW1 then pushed the appellant to PW1's room.

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[13] The appellant admitted that a minute later, the appellant walked toward the deceased, who was about five to six feet from the appellant and hit the deceased on the head with the rice cooker. The appellant testified that he struck the deceased with the rice cooker because he was angered by the deceased's verbal vulgarities about the appellant's parents. The appellant's father had passed away whilst his mother was in the hospital.

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[14] Essentially, the appellant's defence was the defence of grave and sudden provocation due to the vulgar words used by the deceased towards his parents.

The Decision Of The Trial Judge At The End Of The Trial

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[15] The trial judge, having considered the defence and the totality of the evidence before the court, found that the defence had failed to establish the defence of grave and sudden provocation on the balance of probabilities through the said utterance of vulgarities by the deceased. In coming to this finding, the trial judge considered *inter alia*, that the utterance of the said vulgar words were not put to the prosecution's witnesses PW1, PW2 and PW12 who recorded the appellant's statement. In the appellant's statement (D25) also, nothing was mentioned about the verbal provocation by the deceased.

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[16] The trial judge was also of the view that, in any event, the appellant's act of hitting the deceased head with the rice cooker was not proportional to the alleged vulgar words uttered by the deceased or proportionate to the argument and fights that happened on that material time which reliance can be placed on the defence of grave and sudden provocation.

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[17] In the circumstances, it was the trial judge's considered view that the defence had failed to prove the defence of grave and sudden provocation afforded under exception 1 of s. 300 of the Penal Code. Further, the trial judge found that the defence had failed to raise any reasonable doubt in the prosecution's case, and consequently, the prosecution has proven its case

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- A beyond a reasonable doubt. The trial judge then found the appellant guilty as charged and convicted the appellant for the offence punishable under s. 302 of the Penal Code and sentenced the appellant to death by hanging.

The Appeal Before This Court

- B [18] Before us, counsel for the appellant submitted only one main issue, which is the flagrant incompetency of the previous counsel who represented the appellant during the trial resulting in a breach of the appellant's constitutional rights to a fair trial.

The Analysis And Decision Of This Court

- C [19] Before we addressed the interesting issue of the counsel's incompetency, raised by the counsel for the appellant, it is pertinent to analyse the totality of the evidence in considering whether, at the end of the prosecution's case, the prosecution had proven a *prima facie* case and at the end of the trial, had proved its case against the appellant, beyond any reasonable doubt.

- D [20] It is settled law that to establish a *prima facie* case for an offence of murder punishable under s. 302 of the Penal Code, the ingredients to be proved by the prosecution are the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the appellant and the appellant's act comes within one or a combination of the limbs under s. 300 of the Penal Code.

- E [21] For ease of reference, s. 300 of the Penal Code provides:

Except in the cases hereinafter excepted, culpable homicide is murder:

- F (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- G (c) **if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;** or
- H (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

(emphasis added)

- I [22] It is not in dispute that the prosecution, in this case, is relying on cl. (c) of s. 300 of the Penal Code that the appellant intentionally caused bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death.

[23] In the present case, the death of the deceased and the deceased death was a result of the injuries inflicted by the appellant were sufficiently proved by the evidence of PW1, PW2, and PW4. The proving of these ingredients was not seriously challenged by the defence during the trial. The defence's main contention or challenge at the trial was that the prosecution had failed to prove the appellant's act comes within any of the limbs under s. 300 of the Penal Code which includes cl. 300(c).

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[24] Reverting to cl. 300(c) of the Penal Code, it is trite that the prosecution has to prove firstly, that the appellant intentionally caused the injury to the deceased, and secondly, the injury caused is sufficient in the ordinary course of nature to cause death. The intention to cause death is not an ingredient to be proved for the application of cl. 300(c).

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(see *Virsa Singh v. State of Punjab* AIR [1958] 465 (SC); *Tham Kai Yau & Ors v. PP* [1967] 1 LNS 159; [1977] MLJ 174 (FC))

[25] In a recent Federal Court case of *Zulkiplé Mohamad v. PP* [2022] 1 CLJ 673, the elements to be proved for the application of cl. (c) of s. 300 was reiterated as follows:

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[28] The elements that the prosecution needs to prove in order to establish a case under cl. (3) of s. 300 of the Indian Penal Code, which corresponds with cl. (c) of s. 300 of our Penal Code, were spelt out by Vivian Bose J in *Virsa Singh* and they are as follows:

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- (i) it must be established that a bodily injury is present;
- (ii) the nature of the injury must be proved;
- (iii) it must be proved that **there was an intention to inflict that particular bodily injury**, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and
- (iv) it must be proved that the injury of the type described, made up of the three elements set out above, **is sufficient to cause death in the ordinary course of nature**.

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(emphasis added)

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[26] In the same case, the Federal Court explained extensively the interpretation of the burden to prove intention under cl. (c) of s. 300 and its application in the following manner:

[50] It follows that where the case falls under cl. (c) of s. 300 of the Penal Code, there is no requirement for the prosecution to prove intention to cause death under cl. (a), or knowledge of the likelihood of death under cl. (b) or knowledge of the imminent danger of the act under cl. (d). *What the prosecution needs to prove in order to bring the case under cl. (c) of s. 300 is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death.*

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- A [51] We need to come back to *Virsa Singh* to hopefully clear the point beyond controversy. In that case, counsel for the appellant had in fact argued that the ‘intention’ that cl. (c) of the Indian Penal Code requires must be related not only to the bodily injury inflicted but also to the clause “and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death”. The Supreme Court disagreed
- B and the reason for its disagreement was this: This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the thirdly would be unnecessary because the act would fall under the first part of the section, namely:
- C If the act by which the death is caused is done with the intention of causing death.
- D [52] This exposition by the Supreme Court dispels any notion that under cl. (c) of s. 300 of the Penal Code, the prosecution is required to prove that the bodily injury intended to be inflicted was intended to cause death in the ordinary course of nature. *The only requirement under cl. (c) is for the prosecution to prove that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.*
- E [53] *The ‘intention’ or the mens rea element of murder under cl. (c) of s. 300 of the Penal Code must not be coalesced with the ‘intention’ or the mens rea element of murder under cl. (a).* Under cl. (a), death is the intended consequence and death results as intended, whereas under cl. (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death.
- F (emphasis added)
- [27] It is also trite that intention cannot be proved by direct evidence but could be inferred from the appellant’s act and the surrounding circumstances.
- G (see *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] MLJ 174 (FC); *Dato’ Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 (FC); *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151 (SC); *Mohd Shawal Abdullah v. PP* (Rayuan Jenayah K-05(M)-160-04-2016) (CA))
- H [28] In the present case, the trial judge had made a finding of facts that the appellant had intentionally caused injury to the deceased, head which in the ordinary course of nature would cause death. As such, cl. (c) of s. 300 of the Penal Code is applicable. The basis of this finding was that PW1 and PW2 saw the appellant’s act of striking the deceased, head with the rice cooker, the appellant assaulted the deceased barely a minute after the appellant sat on the sofa in PW1’s room, the force of the strike was so great that it caused
- I the deceased to shriek and fall to the floor, that the strike was directed to the deceased’s head and the injuries caused by the strike resulted in the death of the deceased.

[29] Having considered the evidence, we have no reason to interfere with this finding as it was supported by evidence that was correctly evaluated by the trial judge. Furthermore, the principle of law is that when dealing with the finding of facts, the trial judge is in a better position to decide.

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(see *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 (FC); *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 (FC))

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[30] In the circumstances, the first ingredient of cl. (c) of s. 300, that the appellant intentionally caused bodily injury to the deceased had been proven by the prosecution in the present case.

[31] In furtherance of this, the next consideration is whether the injuries inflicted by the appellant to the deceased, in the ordinary course of nature cause death.

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[32] On this issue, counsel for the appellant contended that the pathologist (PW4), did not specifically state in his witness statement or his oral testimony that the injury inflicted on the deceased by the accused, in the ordinary course of nature caused death. This omission was argued fatal to the prosecution's case. Reliance was placed on the Court of Appeal case of *Mohd Yasser Shaik Mahmud v. PP* [2017] 5 CLJ 44; [2017] 4 MLJ 250 to support the contention.

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[33] Here, the evidence of the pathologist, PW4, is pertinent in considering the issue. The trial judge had analysed PW4's evidence comprehensively and concluded that the injuries inflicted by the appellant, in the ordinary course of nature caused death although PW4 did not specifically state these specific terms. In para. 33 of the grounds of judgment, the trial judge explained his findings as follows:

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[33] In WSP4, SP4 had stated that the death was caused by a head injury due to blunt force trauma. In his oral testimony, SP4 was certain in his opinion as the pathologist in this case that exhibit P20B could cause injuries that were consistent with the external injuries inflicted upon the deceased. *During cross-examination, SP4 had explained that the subgaleal haematoma corresponded to the external injuries due to blunt force trauma and he ruled out that the subgaleal haematoma was caused by excitement during a quarrel or fight, or a fall. The trauma to the head had then caused an oedema of the brain which resulted from the accumulation of blood and fluid within the cranial cavity.* The evidence of SP4 taken as a whole leads to the understanding and conclusion that the deceased had died due to an external injury that caused internal injuries to the brain and which then led to death. *The prima causa of that injury was the blunt force trauma.* As testified by SP4 that blunt force trauma can be caused by exhibit P20B. SP1 and SP2 saw the Accused strike exhibit P20B on the head.

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The Accused stated in exhibit D25 that he struck the Deceased on the head using exhibit P20B. *It was the strike that caused the Deceased to shriek, fall, bleed, and rendered helpless.* SP3 had testified that when he arrived at the

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- A hostel to take him to the hospital, the Deceased had to be carried to his car by 2 persons. *There is, therefore, no doubt that the injury inflicted on the Deceased was a type that was sufficient in the natural course of nature to cause death.*

(emphasis added)

- B [34] In this regard, it is instructive to analyse the evidence of the pathologist, PW4, in considering the issue at hand. The injuries found by PW4 when conducting the post-mortem on the deceased are as follows:

- (i) Bruise below the lower lip measuring 4 x 1 cm;
- (ii) Abrasions at the inner aspect of the lower lip measuring 3.5 x 1 cm;
- C (iii) Bruise at the right side of the forehead measuring 4.5 x 5 cm;
- (iv) Sutured laceration wound within the wound (iii) measuring 2.5 cm (with 3 intact sutures). The lower edge was located 7 cm above and 11 cm anterior to the right mastoid process. The upper edge is located 10 cm above and 10 cm anterior to the right mastoid process;
- D (v) Laceration at the right frontal aspect of the scalp measuring 2 x 0.5 cm, located 13 cm above and 5 cm anterior to the right mastoid process;
- (vi) Swelling at the right temporo-parietal region measuring 2.5 x 3 cm, located 13cm above and 5 cm anterior to the right mastoid process.
- E 2 superficial lacerations are seen measuring 1 x 0.5 cm and 0.5x 0.3 cm each.

[35] Further, upon conducting the internal examination of the deceased head, PW4 found the following:

- F (i) Subgaleal haematoma was seen in the right frontal region, measuring 5.5 x 1.5, correlating to external wound No. (iii), right frontal region, measuring 2 x 1, correlating to external wound No. (v) and left frontal region measuring 6 x 2 cm. PW4 explained during cross-examination that subgaleal haematoma is bleeding seen in the internal aspect of the scalp.
- G (ii) The brain appeared oedematous with flattened sulci and gyri and cut sections of the brain shows narrowed ventricles. Representative sections taken from the brain show generalized oedema (swelling). Signs of hypoxic brain damage are seen with the presence of multiple red neurons with hypereosinophilic cytoplasm are seen.

- H [36] PW4 also testified that the cause of death was head injury due to blunt force trauma and the rice cooker (P20B) shown to PW4 during the trial was said could cause the injury. In addition, PW4 in his witness statement said that there was no evidence of natural disease which could have caused or contributed to the deceased death.

- I [37] Having considered the evidence, in particular, the evidence of PW4, and the circumstances of this case, we agree with the finding of the trial judge that the injury inflicted by the accused is sufficient in the ordinary course of

nature to cause death irrespective of the fact that PW4 did not specifically state in his evidence those words. It is a question of fact for the determination of the court with the assistance of the medical expert, the pathologist. In this regard, reference to the Federal Court case of *Zukiple Mohamad v. PP (supra)* is useful where Abdul Rahman Sebli FCJ delivering the judgment of the court said this:

[15] *Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine. Since however, this is a matter that is in the realm of medical science, medical evidence is needed to assist the court in arriving at a decision.* Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death.

(emphasis added)

[38] The omission to state specifically or positively ‘the injury is sufficient in the ordinary course of nature to cause death’ by the pathologist, is not fatal to the prosecution’s case if the evidence before the court can establish the said requirement. This is also explained by the Federal Court in *Zukiple Mohamad’s* case on p. 682 as follows:

[20] *The crucial part of SP13’s evidence was that the injuries on the deceased’s head could cause direct or almost immediate fatality, ie, death (“Kecederaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian”).* He testified that the deceased would not be able to survive the injuries.

[21] *This effectively means that the injuries were of a kind that is “sufficient in the ordinary course of nature to cause death” within the meaning of cl. (c) of s. 300 of the Penal Code although SP13 did not describe the injuries in those exact terms either in his post-mortem examination report or in his oral evidence in court.* At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2, and 3 found on the deceased’s head.

(emphasis added)

[39] This court had also addressed the same issue in the case of *Mohd Shawal Abdullah v. PP* (Rayuan Jenayah K-05(M)-160-04-2016) and held as follows:

[8] Soalan selanjutnya adalah sama ada bencana tubuh tersebut, dipertimbangkan secara objektif, adalah mencukupi pada lazimnya untuk menyebabkan kematian. Daripada apa yang dapat kami fahami, peguam terpelajar seolah-olah menyarankan bahawa mesti adanya dapatan Hakim Bicara atau keterangan pakar patologi yang menyebut, secara khusus, kesan bencana tubuh badan tersebut dengan kata kata tepat yang berikut “mencukupi pada lazimnya untuk menyebabkan kematian” (sufficient in the ordinary course of nature to cause death) *Kami tidak bersetuju dengan saranan itu seolah-olah menghendaki ungkapan sedemikian diucapkan sebagai satu*

- A mentera keramat apabila klausa (c) hendak digunakan. Selaras dengan maksud ujian objektif seperti mana yang digariskan dalam kes *Virsa Singh v. The State of Punjab*, *supra*, dan peranan mahkamah dalam membuat penentuan itu, apa yang perlu dicari dan dipertimbangkan adalah sama ada terdapatnya keterangan terutamanya dari sudut perubahan dalam membantu mahkamah untuk membuat kesimpulan untuk mencapai maksud ungkapan tersebut.
- B (emphasis added)
- [40] In the circumstances, we agree with the decision of the trial judge that the prosecution had proved a *prima facie* case on the charge against the appellant and called the appellant to enter his defence.
- C [41] As alluded to earlier, the appellant's main defence was a grave and sudden provocation. It was said that the deceased had used vulgar words towards the appellant's parents which provoked the appellant to strike the deceased with the rice cooker.
- D [42] The defence is relying on Exception 1 of s. 300 of the Penal Code which provides:
- Exception 1 – Culpable homicide is **not murder** if the offender, **whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation**, or causes the death of any other person by mistake or accident.
- E (emphasis added)
- [43] To succeed in relying on this defence of grave and sudden provocation, the appellant must prove that at the material time, the appellant had been deprived of the power of self-control and the deceased's act of provocation would also deprive a reasonable man of the power of self-control. This is a question of fact for the determination of the trial judge.
- F [44] This principle of law was reiterated in the Federal Court case of *Ikau Anak Mail v. PP* [1973] 1 LNS 51; [1973] 2 MLJ 153 in the following words:
- G ... To succeed in a defence of grave and sudden provocation, *it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self-control but such acts of provocation would also have deprived a reasonable man of the power of self-control.*
- (emphasis added)
- H [45] In another Federal Court case of *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281 this defence of grave and sudden provocation was further explained as follows:
- I [14] *The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law* (see Explanation to Exception 1 to s. 300 of the PC; *Kuan Ted Fatt v. Public Prosecutor* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC). Each case is to be considered according to its own facts. The court must decide on the

particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused, (see *Ratanlal & Dhirajlal*, The Indian Penal Code, 29th edn. 2002 p 1194).

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[15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162. Seah SCJ in delivering the judgment of the court said: *The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control* (see *Nanavati v. State of Maharashtra* AIR [1962] SC 605, 530). In determining what amounts to grave and sudden provocation the court may take into account the habits, manners, and feelings of the class or community to which the accused belongs, *but not of the particular idiosyncrasies* of the accused: *Madhavan v. State of Kerala* AIR [1966] Ker 258 (260).

B

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(emphasis added)

[46] Next, the burden to prove the defence of grave and sudden provocation is on the appellant on the balance of probabilities.

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(see s. 105 of the Evidence Act 1950; *Rikky Purba v. PP* [2014] 3 CLJ 607 (CA))

[47] Reverting to the present case, in the contemporaneous document, that is the appellant's written statement (D25), recorded by PW12, five days after the incident, the appellant states that the reason he struck the deceased with the rice cooker was that the deceased refused to remove his pot that block the appellant's kitchen cabinet. This resulted in the fight between the appellant and the deceased and end up with the deceased struck the deceased with the rice cooker. Nothing was mentioned about the utterance of vulgar words towards the appellant's parent by the deceased.

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[48] In D25, the appellant answered the relevant questions in detail as follows:

S: Apakah punca kamu memukul Minto?

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J: Pada 25/3/18 jam lebih kurang 11 pagi saya dapati lauk kari labu saya berkurang atas dapur. Saya tanya Minto dan Delowar kenapa kari labu saya kurang, mereka kata tikus makan. Saya terus buang baki labu dan masuk dalam bilik. Saya hendak simpan periuk saya dalam almari milik saya. Dapati ada 1 periuk dan 1 periuk nasi milik Minto hadang pintu almari saya. Saya panggil Minto masuk bilik banyak kali dia tidak mahu masuk. Saya terus pergi dekat, minta didapur, minta ubah periuk miliknya tetapi dia tidak mahu ubah dan berlaku gaduh mulut. Tiba-tiba Minto tumbuk muka saya dan saya balas balik, oleh kerana marah saya ambil periuk milik minto ketuk kepala dia sekali, kemudian kawan saya Akram, Delowar dan Iqbal datang leraikan pergaduhan dan suruh sabar. Kemudian saya diasingkan dari Minto oleh kawan-kawan saya. Oleh kerana saya

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A masih marah saya telah ambil pula periuk nasi milik Minto dan pukul sekali di kepala minto, kemudian kawan-kawan pegang saya sekali lagi, tidak bagi saya bergaduh.

...

B S: Adakah kamu ingin tambah apa-apa?

J: Tiada.

S: Adakah Kamu bercakap benar?

J: Ya.

C [49] Here, the defence of grave and sudden provocation arising from the vulgar words used towards the appellant's parents is an important fact that the appellant should inform PW12 when the appellant had the opportunity when his statement was recorded five days after the incident. The appellant's failure to inform PW12 of the pertinent facts at the earliest opportunity justified the trial judge to disbelieve him.

D [50] The analogy can be made from the often-quoted Federal Court case of *Teng Howe Sing v. PP* [2009] 3 CLJ 733, which said this:

E [32] Applying the principle in *Badrulsham's* case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng", *ie*, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, **the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.**

(emphasis added)

G [51] During the defence stage, the appellant testified that he did inform PW12 about the vulgar words uttered by the deceased but was not recorded by PW12 in D25. Having analysed the totality of evidence including D25, this assertion is untenable as also found by the trial judge. The reasons given by the appellant for hitting the deceased as stated in D25 were very detailed as alluded to earlier. There is no reason for PW12 to omit or exclude the appellant's pertinent defence in D25. Further in D25, the appellant admitted that there was nothing to add in D25 and put his thumbprint on it. As such, the trial judge was correct in not accepting the appellant's contention.

H [52] In addition, during the prosecution's case, the defence also failed to put its case to any of the prosecution witnesses in particular PW1, PW2, and PW12, regarding the utterance of the vulgar words by the deceased. PW1 and PW2 were present during the incident and could have heard any utterance of vulgar words by the deceased which was said had provoked the

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appellant to strike the deceased with the rice cooker. However, this was not done. Likewise, when PW12 gave his evidence, no question was put to him regarding the vulgar words and his failure to record them in D25.

[53] Another important fact to note here is that in the appellant's testimony, the appellant had failed to detail out what were the vulgar words uttered by the deceased. This is important as the words that were said had provoked the appellant to strike the deceased. The trial judge needs to assess those words in determining whether the defence had proved on the balance of probabilities that the appellant and any reasonable man would lose the power of self-control because of the utterance of those words. This, the appellant had failed to do.

[54] In his defence, the appellant also testified that he did not know that hitting the deceased head with the rice cooker could injure the deceased or can cause death as he said he did not hit the deceased that hard. This defence, we find, is bereft of any merit as the elements of cl. (c) of s. 300 had been proven when the appellant intentionally caused the injury on the deceased and the said injury in the ordinary course of nature caused death.

[55] Again, reliance is placed on the decision of the Federal Court in *Zulkipli Mohamad's* case (*supra*) where the issue was explained as follows:

[34] In another Singapore Court of Appeal decision, it was held in *Wang Wenfeng v. PP* [2012] SGCA 47 that if the bodily injury intentionally inflicted was sufficient in the ordinary course of nature to cause death, s. 300(c) murder would have been committed "as a matter of course". Chan Sek Keong CJ speaking for the court also touched on the issue of "sufficiency" at p. 602:

33. "Sufficiency" in this context refers to the high probability of death in the ordinary course of nature (*Rajwant Singh v. State of Kerala* AIR 1966 SC 1874 at 1879). The test of whether a bodily injury is sufficient in the ordinary course of nature to cause death is objective - it is not necessary for the accused to have known or intended the potentially fatal consequence of inflicting the bodily injury. It is sufficient that the accused intentionally caused the particular bodily injury inflicted (Tan Chee Wee at [42]-[43]). Hence, a fatal act accidentally caused is a defence to a charge of s. 300(c) murder.

[35] In *Tan Joo Cheng*, counsel for the appellant relying on *Virsa Singh* argued that if the prosecution wanted to rely on cl. (c) of s. 300, they would have to prove that the appellant intended to strike at a vital or dangerous spot of the body. It was submitted that the intention of the appellant in accosting the deceased was only to rob him and not to cause any injury, much less an injury at a vital spot such as the neck which was sufficient in the ordinary course of nature to cause death.

[36] In rejecting the argument, the Court of Appeal pointed out that such approach was in fact specifically rejected in *Virsa Singh* where Vivian Bose J said at p. 468 of the judgment:

A *The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing*
 B *beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence*
 C *of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.*

D (emphasis added)

[56] In the circumstances, we agree with the findings of the trial judge that the appellant had failed to prove the defence of grave and sudden provocation and the prosecution had succeeded in proving its case beyond a reasonable doubt.

E **The Issue of The Appellant's Counsel Flagrant Incompetency**

[57] Counsel for the appellant submitted before us that the appellant's previous counsel, who handled the trial, was flagrantly incompetent which resulted in the appellant being deprived of a fair trial. The reasons for this
 F contention were as follows:

- (i) the counsel's failure to recall PW1 to establish the appellant's defence that the deceased uttered vulgar words towards the appellant's parents;
- (ii) the counsel's failure to engage a Bangladeshi interpreter when the
 G counsel interviewed the appellant in prison. This resulted in the counsel being unable to properly understand the appellant due to the language problem;
- (iii) the counsel's failure to recall PW12 to ask him the reason as to why the
 H fact that the vulgar words uttered by the deceased were not stated in D25 although was informed by the appellant;
- (iv) the counsel's failure to ask the appellant during the trial, the specific vulgar words uttered by the deceased towards the appellant's parents.

I [58] On this issue, the principle of the law envisaged that to succeed in relying on the incompetency of counsel, it must be shown that there has been flagrant or gross incompetency that deprived the appellant of a fair trial. This only applies in an extreme situation that causes a miscarriage of justice.

[59] In this regard, the Federal Court in the case of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 explained the principle of law as follows:

[4] The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v. The State* [1994] UKPC 1, where he put the test as follows:

In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.

[5] What is an “extreme situation” must depend on the facts of each case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial.

[6] That, then, is the state of the authorities. *In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that: (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments.* Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation ...

(emphasis added)

[60] In *Shamim*’s case, the contention was that the failure to put to the prosecution’s witnesses that the deceased was killed by another person other than the appellant was flagrant incompetence of the counsel as the trial judge declined to consider the line of defence. However, this contention was rejected by the Federal Court as the possibility of another person involved in the killing is so far fetch on the facts of the case and that a reasonable tribunal of fact would have rejected it.

[61] In assessing the facts, the court, in that case, explained as follows:

[7] That brings us to the facts of the present case. The real complaint here is focused upon the point that the deceased was killed by some person other than the appellant. *It was submitted for the appellant that the failure to put this to the witnesses for the prosecution was flagrant incompetence because it resulted in the trial judge declining to consider that line of defence altogether. With respect, we cannot agree.* The evidence makes it clear that no person other than the appellant was in the room at the material time. The room was locked from within. This necessitated PW10 to look for the spare key. When she entered, the only person in the room other than the deceased

A was the appellant himself. *The possibility of a third person having entered the room is, on the facts, so far-fetched that a reasonable tribunal of fact would have rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded that line of defence has occasioned no miscarriage of justice on the facts of this case.*

B [8] Having regard to what we have said, we are satisfied that this is not an extreme case of incompetence on the part of counsel. Equally, we are satisfied that this is a case in which the appellant having been properly and deservedly convicted has sought to suggest flagrant incompetence on the part of counsel. Before concluding we must say that the trial could perhaps have been conducted with greater competence than that displayed by counsel who appeared for the appellant at his trial. But there was, on the material provided to us, no flagrant incompetence. *In any event, no miscarriage of justice has been occasioned. The appeal is therefore dismissed. The conviction and sentence are affirmed.*

(emphasis added)

D [62] Likewise in the present case, the real complaint was the previous counsel for the appellant had failed to put to the prosecution's witnesses, in particular PW1, PW2, and PW12 about the vulgar words uttered by the deceased towards the appellant's parents. However, on the totality of the evidence as alluded to earlier, firstly, the possibility of the deceased uttering the vulgar words is also far-fetched considering the facts *inter alia* that no mention was made of these vulgarities in D25 and the prosecution witnesses were not asked on this issue. In any event, as discussed earlier, even if the deceased did utter the vulgar words, the defence has not established the defence of grave and sudden provocation on the balance of probabilities.

F [63] Further, on the issue of the language barrier and the counsel's failure to engage a Bangladeshi interpreter when interviewing the appellant in prison, we find it devoid of any merit. The appellant has been staying in Malaysia for 11 years and it is safe inference to be made that the appellant understands the national language.

G [64] In the circumstances, we are of the view that there was no flagrant incompetency on the part of the appellant's counsel that deprived the appellant of a fair trial. We also find that there was no miscarriage of justice occurred in the present case.

H [65] Further, the reliance on the recent Federal Court case of *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414 by counsel for the appellant in the present appeal is misplaced. The facts, in that case, are readily distinguishable. In that case, the accumulative reasons that made the court in deciding that there was flagrant incompetency of the counsel that deprived a fair trial are as follows:

I (i) the appellant's counsel failed to put the appellant's defence during the prosecution's case;

- (ii) the appellant's counsel refused to consider the appellant's narrative that the drugs belong to the appellant's brother-in-law and the appellant was an innocent carrier and instead chose to mount another defence for the appellant which is the discrepancy in the weight of the drugs; A
 - (iii) the counsel's failure to call the appellant's wife as a witness even though the wife was prepared and ready to be a witness. B
 - (iv) no submission was made by the appellant's counsel at the end of the prosecution's case.
- [66] The facts in *Yahya Hussein's* case are poles apart from the facts in the present case and thus, that case is of no assistance to the appellant. C

Conclusion

[67] Based on the foregoing reasons, it is our unanimous decision that the conviction against the appellant is safe and needs no intervention by this court. Therefore, the appellant's appeal is dismissed and the decision of the High Court on the conviction and sentence are affirmed. D

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